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Running Against Hoover

By William Safire

WASHINGTON, May 17—The ill-considered decision of the Carter Administration to prosecute former F.B.I. officials, and to discipline present F.B.I. agents, for using questionable but long-tolerated investigative techniques in order to stop the terrorist bombers of the Weather Underground, has begun to backfire.

The accused lawmen and threatened agents have refused to cop the plea offered them; they will not plead to a misdemeanor and take a suspended sentence. On principle, they say they operated within then-recognized guidelines in upholding public safety, and that current operations of the Justice Department are not that much different today.

What worries Justice most is the accused officials' right to "discovery"—finding out about past and current practices similar to those they are accused of—which would then be taken before a jury in open court.

For nearly a year, people inside and outside Justice have been nervous about "cooperating with the law," when such cooperation may later be deemed illegal.

For example, after Vice President Mondale made a speech in August of 1977 supporting a bill outlawing all warrantless wiretapping, the telephone company—which does the tapping for the Government and is worried about civil damage suits arising therefrom—threatened to refuse to do any foreign intelligence work without a court order.

On Sept. 29, 1977, Attorney General Griffin Bell wrote American Telephone and Telegraph "to assure you that it remains the position of the Executive Branch that the foreign intelligence surveillances . . . are a lawful exercise of the President's constitutional power."

Nervousness about being sued or prosecuted tomorrow for what the A.G. says is legal today extends to agents on the beat. The longest floating investigation in existence is the F.B.I.'s surveillance of the Communist Party of the U.S.A., begun in 1938. In 1976, Attorney General Levi—recognizing that the surveillance of a political party could no longer lawfully be conducted under the rubric of "domestic security"—simply switched the case's cover sheet, giving that investigation the legal rationale of a foreign intelligence probe.

"Discovery" will show that F.B.I. agents have been following certain officials of the Communist Party in the

calls, at the very least. (Properly, Judge Bell refuses to confirm even the existence of this particular investigation: he tells me, "I never signed a wiretap authorization on the Communist Party U.S.A." and that no surveillance is being used which, if used in a criminal case, would require a warrant. He adds obliquely, "we just keep up with people.")

Someday, however, the question will arise: Is this legal? When the Trotskyite Socialist Workers Party was the object of the F.B.I.'s "Cointelpro" surveillance only a few years ago, it rightly hollered bloody murder and the F.B.I. was denounced for police-state tactics.

If the Communist Party, U.S.A., is an agent of a foreign power, or if its leaders are engaged in conducting espionage here, Justice ought to prove its case and close the sham party down; if you cannot make a case after forty years, you're not really trying.

On the other hand, if the long-suspected, closely watched leaders of the Communist Party here are not demonstrably agents of a foreign power, then it is the "foreign intelligence" excuse for keeping them under surveillance that is the sham, and we should extend to our card-carrying friends the same protections accorded members of any other party.

One day, what the F.B.I. is now doing will be challenged. Put yourself in the shoes of the F.B.I. agent taking pictures from across the street of visitors to Communist Party headquarters; will future interpreters of the

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law find him guilty? Put yourself in the shoes of the Attorney General: "I cannot be certain that I won't be prosecuted someday for doing what I think is legal today."

That's not right: a person's actions should be judged in the context of the time those actions are taken, and not ex post facto. Of course, if "discovery" should turn up a memo dated only last spring directing F.B.I. agents to work in certain gray areas with the assurance that what seems illegal is really permissible counterespionage, that would be an even more vivid example of hypocrisy.

At a time when Soviet expansionism and espionage are gaining strength, Mr. Carter ought not to be looking for scapegoats to satisfy our consciences for yesterday's practices, or blowing an uncertain trumpet at today's troops. Justice should drop its politically inspired indictments before "discovery"

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